

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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CHARLES DEJUAN MORRIS,

Petitioner,

v.

ISIDRO BACA., et al.,

Respondents.

Case No. 3:13-cv-00137-MMD-VPC

ORDER

This is a habeas corpus proceeding pursuant to 28 U.S.C. § 2254. Respondents have filed a motion to dismiss arguing that the habeas petition herein is a second or successive petition filed without authorization from the court of appeals as required by 28 U.S.C. § 2254(b)(3).

Under 28 U.S.C. § 2244(b), where the petitioner has previously filed an application for habeas relief under section 2254 which has been denied on the merits, the court cannot grant relief with respect to a claim that was presented in a prior application ((b)(1)) or a claim that was not presented in a prior application ((b)(2)) unless:

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

1 In addition, § 2244(b)(3) requires a petitioner to obtain leave from the appropriate court  
2 of appeals before filing a second or successive petition in the district court.

3 In 2006, petitioner initiated in this Court a federal habeas action under 28 U.S.C.  
4 § 2254 that was assigned case number 3:06-cv-00493-ECR-RAM. On February 23,  
5 2010, this Court entered an order granting petitioner's motion to voluntarily dismiss  
6 several unexhausted claims and denying petitioner's remaining claims on the merits.  
7 (3:06-cv-00493-ECR-RAM, dkt. no. 64.) A judgment to that effect was entered the same  
8 day. (*Id.*, dkt. no. 65.) The Ninth Circuit affirmed this court's decision on appeal. (*Id.*,  
9 dkt. nos. 77-79.)

10 Petitioner does not dispute that the instant proceeding is a second or successive  
11 petition for the purposes of 28 U.S.C. § 2244(b). Instead, he argues only that  
12 respondents waived § 2244(b) as a defense by not asserting it when this Court allowed  
13 this action to proceed and appointed counsel on June 4, 2014. However, the  
14 requirement that petitioner obtain authorization from the circuit court before filing a  
15 second and successive petition in the district court is jurisdictional. *Burton v. Stewart*,  
16 549 U.S. 147, 152 (2007). Thus, the requirement is not subject to waiver. See *Torres v.*  
17 *Senkowski*, 316 F.3d 147, 151 (2<sup>nd</sup> Cir. 2003) (successive petition limitation cannot be  
18 waived by failure to object).

19 Petitioner has made no showing that the exceptions outlined in 28 U.S.C. §  
20 2244(b)(2) apply. Further, he has failed to secure an order from the court of appeals  
21 authorizing this action as required by 28 U.S.C. § 2244(b)(3). Therefore, this Court is  
22 without jurisdiction to consider the habeas petition submitted herein.

23 If Petitioner seeks to appeal this decision, he must first obtain a certificate of  
24 appealability. See 28 U.S.C. § 2253(c) (providing that an appeal may not be taken to  
25 the court of appeals from a final order in a habeas proceeding unless a circuit justice or  
26 judge issues a certificate of appealability); *Sveum v. Smith*, 403 F.3d 447, 448 (7<sup>th</sup> Cir.  
27 2005) (per curiam) (holding that a certificate of appealability is required when the district  
28 court dismisses a petition on the ground that it is an unauthorized, successive collateral

1 attack). A certificate of appealability may issue only if the petitioner “has made a  
2 substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). In  
3 addition, when a § 2254 petition is denied on procedural grounds, a certificate of  
4 appealability should issue only when the petitioner shows that reasonable jurists “would  
5 find it debatable whether the district court was correct in its procedural ruling.” *Slack v.*  
6 *McDaniel*, 529 U.S. 473, 484 (2000).

7 Petitioner has not made a substantial showing of the denial of a constitutional  
8 right or that a reasonable jurist would find it debatable whether the district court was  
9 correct in its procedural ruling. Therefore, the Court denies a certificate of appealability.

10 It is therefore ordered that respondents’ motion to dismiss (dkt. no. 33) is  
11 granted. The petition is dismissed for lack of jurisdiction. The Clerk shall enter judgment  
12 accordingly. A certificate of appealability is denied.

13 It is further order that petitioner’s motion to conduct discovery or, in the  
14 alternative, for additional time to file an amended petition (dkt. no. 32) is denied as  
15 moot.

16 DATED THIS 3<sup>rd</sup> day of June 2015.

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19 MIRANDA M. DU  
20 UNITED STATES DISTRICT JUDGE  
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